

No. 48566-4-II

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION TWO

CRJ KIM, INC., a Washington corporation,

Plaintiff/Respondent,

vs.

JKI INVESTMENTS, INC., a Washington corporation,

Defendant/Appellant.

Clallam County Superior Court No. 15-2-00346-4,
the Honorable Christopher Melly presiding

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DEPUTY

BRIEF OF APPELLANT

LIVENGOD ALSKOG, PLLC
John J. White, Jr., WSBA #13682
Kevin B. Hansen, WSBA #28349
121 Third Avenue / P.O. Box 908
Kirkland, WA 98083-0908
Ph: 425-822-9281
Fax: 425-828-0908
white@livengoodlaw.com
hansen@livengoodlaw.com
Attorneys for Appellant

LAW OFFICES OF DENNIS J. PERKINS
Dennis J. Perkins, WSBA #5774
121 Third Avenue / P.O. Box 908
Kirkland, WA 98083-0908
Ph: 425-455-5882
Fax: 425-828-0908
dperklaw@seanet.com
Attorney for Appellant

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I. INTRODUCTION

Despite the failure of the prospective buyer (CRJ Kim, Inc.) and seller (JKI, Inc.) of JKI's business assets to agree on the price of JKI's real property, the trial court granted specific performance to the buyer. The parties never reached agreement on the price for the business's real property, tangible and intangible personal property or for an agreement not to compete from both the selling corporation and its individual owner. Price is no less an essential element of the contract than is a full description of the real property to be sold. Failure to agree on the selling price for real property precludes specific performance because a trial court cannot add terms to which the parties have not agreed. The trial court should have granted summary judgment to JKI on its claim that the asset sale contract was unenforceable.

During the lengthy negotiations, the buyer proposed and drafted a "dead man's switch" provision, making its obligation to buy contingent on financing. If the buyer did not give written notice that the financing contingency had been satisfied or waive the contingency by a certain date, the agreement would automatically terminate and the buyer would receive its earnest money back. Each party had objective certainty when its obligations might end. The buyer gave neither notice of satisfaction nor waiver by the termination date. The contract expired, and post-expiration

communications, including efforts to arrive at the price to be allocated to the real property, other assets and the noncompetition agreement, could not revive the expired contract. The trial court should have, but did not, given JKI summary judgment that the contract was unenforceable because it had expired.

II. ASSIGNMENTS OF ERROR

- A. The trial court erred by denying JKI's motion for summary judgment and granting CRJ Kim's motion for partial summary judgment, ordering specific performance of a contract that lacked essential terms, which requires the court to supply terms required for closing to which the parties did not agree.**

Issues Pertaining to Assignment of Error:

1. Is the allocation of the purchase price for the sale of a business between the real property, personal property, goodwill, and non-compete agreement an essential term of the agreement?
2. Could the sale have closed without the parties reaching an agreement on the allocation of the purchase price of the hotel business?
3. Without an allocation of the purchase price among the business's various assets, did the parties agree on the purchase price of the real property?
4. Did clear and unequivocal evidence leave no doubt as to the purchase price of the real property, as required to order specific performance?

5. Does an essential term of a contract become non-essential because the parties did not discuss or consider it?

B. The trial court erred by denying JKI's motion for summary judgment and granting CRJ Kim's motion for partial summary judgment, ordering specific performance of a contract that had terminated by its own terms.

Issues Pertaining to Assignment of Error:

1. Was all of Financing Addendum Paragraph 1 part of the agreement between the parties?

2. Were there conflicts between the terms of Addendum Paragraph 2 and the terms of Financing Addendum Paragraph 1 such that the trial court was required to rely on rules of construction to resolve the conflict?

3. Did the trial court construe any ambiguities in the meaning of Addendum Paragraph 2 and Financing Addendum Paragraph 1 in favor of the drafter, CRJ Kim?

4. Did CRJ Kim give timely notice that the financing contingency was satisfied or waived?

5. Did CRJ Kim's failure to give timely notice that the financing contingency was satisfied or waived result in the termination of the agreement by its express terms?

6. When a contract provides that it automatically terminates on the non-occurrence of a condition, is only conduct before the deadline relevant to determine whether waiver of the condition occurred?

7. Did any conduct before the March 2 deadline provide evidence of JKI's unequivocal intent to waive the notice requirement?

8. Did the trial court properly resolve a question of fact whether any conduct after the March 2 deadline unequivocally evidenced JKI's intent to waive the notice requirement?

C. The trial court erred by denying JKI's motion for summary judgment on the claim that David Kim tortiously interfered with the contract.

Issue Pertaining to Assignment of Error:

1. Is CRJ Kim unable to prove an element of a tortious interference claim where David Kim could not have caused the termination of the contract because it terminated by its own terms?

III. STATEMENT OF THE CASE

JKI owns and operates the Super 8 Hotel in Port Angeles. CP 133. David Kim is JKI's president. CP 133. After listing the business for sale with Juliana May of Better Properties Unlimited, JKI received a written purchase offer from CRJ Kim in late October, 2014. CP 134. CRJ Kim was represented by Sung Woon Yop of Newstar Seattle Properties, Inc. CP 134. The parties traded counteroffers and counter-counteroffers

through their agents until mutually accepting the terms of the Commercial & Investment Real Estate Purchase and Sale Agreement (“PSA”) on December 31, 2014. CP 134-35, 137-54. The PSA was subject to contingencies and still-open terms.

The PSA includes a 19-paragraph¹ Addendum and a Financing Addendum. CP 149-54. The buyer, CRJ Kim, drafted and proposed both the initial Addendum and the Financing Addendum. CP 134, 379, 381-82. Addendum Paragraph 2 provides:

This offer is contingent upon Buyer obtaining financing from lender. That financing from the lender is subject to satisfactory [*sic*] of Appraisal, Phase 1 report and Phase 2 report if necessary.

CP 149. The Financing Addendum elaborates the financing contingency, and provides:

The Agreement shall terminate and Buyer shall receive a refund of the earnest money unless Buyer gives notice that this condition is satisfied or waived on or before ____ days (60 days, if not completed) following mutual acceptance of the Agreement.

CP 153 (last sentence of paragraph 1). PSA Paragraph 18 specifies how notices must be given:

Unless otherwise specified, any notice required . . . in . . . this Agreement . . . must be in writing. Notices to Seller

¹ The paragraphs are numbered from 1 through 17, CP 149-52, but there are two each of paragraphs 8 and 9. CP 149-50.

must be signed by at least one Buyer and must be delivered to Seller and Listing Broker

CP 142. Addendum Paragraph 6 also specifies the consequences if the Buyer did not remove the contingencies:

Buyer shall remove all the contingencies on or before at [sic] the end of each contingencies [sic]. Otherwise this agreement shall become null and void, and the earnest money shall be returned to buyer in full.

CP 149.

CRJ Kim's president, Wha Jin Kim, acknowledged that the 60 day notice requirement in the Financing Contingency was part of the PSA and that CRJ Kim was obligated to comply with it:

Q. . . . Let me ask you to look back on the financing addendum. . . . If you look at the paragraph one, the last sentence. Yes, I'm sorry. The last sentence of paragraph one. It says, "The agreement shall terminate and buyer shall receive a refund of the earnest money unless buyer gives notice that this condition is satisfied or waived on or before 60 days following mutual acceptance."

A. Right.

Q. Is that part of the agreement between you and JKI Investments?

A. Okay. Between JKI Investments and CRJ.

Q. CRJ Kim, yes.

A. Yes.

* * *

Q. Of the two pages of the financing addendum there are no boxes checked. Is that correct?

A. Right.

Q. So based on that was it your understanding that you had no obligation to comply with any of the requirements of the two pages of the financing addendum?

A. No.

Q. That is wasn't your responsibility to comply with that?

A. No, I do.

Q. You do have to comply with that financing addendum.

A. Right. I should comply.

CP 98 (*ll.* 9-22); CP 99 (*ll.* 2-14). Although CRJ Kim gave notice that the "inspection" contingency was removed on February 12, 2015,² CP 156, as required under PSA Paragraph 5, CP 138-39, it gave no notice to JKI that the financing contingency was satisfied, waived, or removed. CP 135. The 60-day notice period expired on March 2, 2015.³

The PSA contains no allocation of the purchase price among real property, personal property, goodwill, or the noncompete provision in Addendum Paragraph 12. In fact, the parties never discussed how to allocate the purchase price during negotiations for the sale. CP 100-02, 135. Not until March 17, 2015 did CRJ Kim's accountant send a proposed

² As CRJ Kim later made clear, it meant that it was removing the feasibility contingency. CP 453-54.

³ March 1, 2015, a Sunday, was the 60th day after December 31, 2014, and under the PSA the deadline expired "on the next day that is not a Saturday, Sunday or legal holiday." CP 142 (§ 18).

allocation to Wha Jin Kim, CP 101, 103-05, and the closing agent sent a proposed addendum with CRJ Kim's desired allocations to the parties the following day. CP 341, 366.

In the "Closing Escrow Instructions," which both parties were asked to sign, the escrow agent advised that the sale could not close without agreement on the allocation and that there were different tax consequences from different allocations:

21. ALLOCATION OF THE PURCHASE PRICE. Both parties are urged to consult their own accountant regarding the allocation of the purchase price. ***Both parties must agree upon the allocation.*** The parties acknowledge and agree that Escrow has made no representations concerning the appropriateness of said allocation or the proposal thereof.

CP 348 (emphasis added). The proposed addendum, which was not signed, provided:

The parties covenant and agree that the allocation of the purchase price for the assets set forth above is accurate and correct and was separately negotiated.

CP 366. David Kim noted that the proposed allocation had significant tax consequences and did not agree to the allocation. CP 91, 101.

Prior to March 2, JKI began providing the business's financial information to CRJ Kim's prospective lender – a profit & loss statement for 2014, a balance sheet for 2014, a signed IRS Form 4506-T (Request

for Transcript of Tax Return), and “Star Reports”⁴ for 2013 through 2015. CP 313-22. On March 2, JKI continued responding to requests from the lender and providing financing information for the business. CP 323-30. From March 3 until March 9, 2015, JKI gave the lender permission to speak with its CPA about the business financials, responded to a request for information from its agent about improvements to the hotel, agreed to meet with the lender’s appraiser, responded to questions about credit card transactions at the hotel, and made recommendations for employee retention bonuses. CP 331-35.

On March 19, 2015, the day after the closing agent sent the proposed addendum with CRJ Kim’s desired purchase price allocations, JKI’s counsel notified CRJ Kim that the PSA had terminated by its terms, in part due to CRJ Kim’s failure to timely give the notice required by paragraph 1 of the Financing Addendum. CP 158. As a result, JKI refused to pursue the transaction further and offered to return CRJ Kim’s earnest money. CP 135, 159.

CRJ Kim filed this lawsuit on April 28, 2015, seeking specific performance of the PSA and incidental damages. CP 600-34. A month

⁴ “The STAR (Smith Travel Accommodations Report) program is used by the global hotel industry as a vital revenue management tool. The report benchmarks a hotel’s performance against its competitive aggregate and local market.” <https://www.strglobal.com/products/star-program>.

later, on May 29, JKI's real estate agent Juliana May visited David Kim at the hotel to see if there was any way the sale to CRJ Kim could go forward. CP 91. David Kim reminded her that the wife of CRJ Kim's president had made comments during an earlier visit to the hotel which caused several employees to quit, requiring him to hire and train new employees.⁵ CP 91. He also reminded her that he was incurring substantial costs to defend the lawsuit. CP 91. Because of this, he told her that JKI would only reconsider selling the business to CRJ Kim if the purchase price were increased by \$1,000,000.00. CP 91. According to Ms. May, David Kim told her at that time that he did "not want to sell to this particular Buyer because [he] hate[d] him 100%." CP 376. CRJ Kim subsequently amended its complaint to add a cause of action against David Kim and his marital community for tortious interference with a contractual relationship.

⁵ During a room-by-room inspection visit in January 2015, Wha Jin Kim's spouse made comments in the presence of JKI's employees that the hotel would be sold and they would be the new owners. CP 89-90. This violated PSA Paragraph 25. CP 145 ("Until and unless closing has been consummated, Buyer and Seller shall follow reasonable measures to prevent unnecessary disclosure of information obtained in connection with the negotiation and performance of this Agreement. Neither party shall use or knowingly permit the use of such information in any manner detrimental to the other party.").

The parties filed cross-motions for summary judgment.⁶ After oral argument on November 20, 2015, the trial court granted CRJ Kim's motion, denied JKI's motion, and issued a memorandum opinion explaining its reasoning. CP 10-31. The court certified the decision as a final judgment on CRJ Kim's specific performance claim under CR 54(b). CP 12-13, 29-31. JKI timely appealed. CP 640-66.

IV. SUMMARY OF ARGUMENT

The right to contract belongs to the parties. Where the parties fail to reach agreement on essential terms, a trial court cannot impose terms. Specific performance of a contract to sell real property is unavailable unless the party seeking specific performance provides clear and unequivocal evidence that leaves no doubt as to the essential terms of the agreement, including the purchase price. Here, because an asset sale agreement did not allocate the purchase price among the business's assets (and covenants not to compete with both the business and its owner), there was no agreement on the purchase price for the real property. Thus, the trial court erred in ordering specific performance of the sale and in denying JKI's motion for summary judgment.

⁶ CRJ Kim moved for partial summary judgment on its specific performance claim, asking the trial court to order JKI to sell the business to CRJ Kim. CP 483-502. JKI and David Kim moved for summary judgment, asking the court to dismiss all of CRJ Kim's claims. CP 160-70.

In a contract where time is of the essence, a provision stating that the contract automatically terminates if a condition precedent is not met must be given effect. Here, when CRJ Kim failed to timely provide notice that the financing contingency was waived or satisfied, the purchase agreement automatically expired. Post-expiration communications and conduct do not alter the automatic termination of the agreement. Because the agreement terminated automatically based on CRJ Kim's inaction, David Kim cannot be liable for tortious interference. He did nothing to cause the termination of the agreement.

V. ARGUMENT

A. Standard of review.

"The standard of review of an order of summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court." *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The facts and reasonable inferences from the facts are considered in the light most favorable to the nonmoving party. *Jones*, 146 Wn. 2d at 300.

B. The purchase and sale agreement lacks material and essential elements for the sale of real property, and therefore cannot be specifically enforced.

A trial court may only order specific performance of a contract for the sale of real property when the contract contains all of the material and essential terms as to what the parties must do to constitute performance. *Hubbell v. Ward*, 40 Wn.2d 779, 787, 246 P.2d 468 (1952). A preliminary agreement (the PSA) “must be definite enough on material terms to allow enforcement without the court supplying these terms.” *Setterlund v. Firestone*, 104 Wn.2d 24, 25, 700 P.2d 745 (1985). One of the material terms is the price to be paid for the real property. *Hubbell*, 40 Wn.2d at 787. The PSA stated a lump sum purchase price of \$3,500,000 for the business – the hotel and land, its furniture, fixtures, goodwill, and a noncompete agreement,⁷ but did not allocate among those items. It did not establish a purchase price for the real property.

Although the trial court correctly noted that “[t]here isn’t the slightest hint that allocation of the purchase price was even discussed by

⁷ The noncompete applied both to JKI and David Kim, but did not indicate what consideration was given for Mr. Kim’s agreement to not compete. CP 150 (Addendum Paragraph 12: “Seller, and all partners, members, shareholders, officers and directors of Seller, agree that . . . neither Seller nor its partners, members, shareholders, officers or directors will participate in the ownership or operation of any business that competes directly with the business sold to Buyer . . .”).

the parties,” CP 26, and “there is no indication in the record that the purchase price allocation was important to either of the parties,” CP 26, it concluded that “the failure of the parties to allocate the purchase price does not constitute an essential term of the contract and its omission is not fatal to specific enforcement of the PSA.” CP 27.

This conclusion is wrong. The court failed to note that the PSA was for the sale of a business, not merely real estate. It included all of the assets of an ongoing hotel business, including equipment, furniture, and fixtures. CP 149. The PSA required JKI to provide financial information regarding its *business operations*, which was required for CRJ Kim to obtain financing. CP 149-51. The PSA included a covenant not to compete. CP 150. Without an allocation of the total purchase price among the real property and other assets, the purchase price of the real property cannot be determined. Allocation of the purchase price among these items is therefore an essential term of the PSA between JKI and CRJ Kim.

Courts in other jurisdictions have recognized this principle. *Biegler v. Kraft*, 924 F. Supp. 2d 1074, 1092 (D.S.D. 2013) (“Among the problems with requiring specific performance under the circumstances of this case is that this Court would have to arrive at the appropriate valuation of the home, thereby supplying an essential term on which the parties could not agree.”); *SCI ITC S. Fund, LLC v. Dir., Div. of Taxation*,

24 N.J. Tax 205, 219 (2008); *Mission Denver Co. v. Sound Corp. of Colo.*, 515 P.2d 1151, 1152 (Colo. App. 1973).

If an essential term of an agreement for the sale of real property has not been agreed upon by the parties, that term should not be supplied by the court, and the contract should not be specifically enforced. The Supreme Court explained these principles in *Haire v. Patterson*, 63 Wn.2d 282, 287, 386 P.2d 953 (1963):

. . . It is unthinkable that courts should undertake the writing of contracts for sellers and buyers who have failed or refused, rightly or wrongly, to come to terms between themselves. Such a course could seriously impair the right of free alienation of property.

Restatement, Contracts § 370, p. 464: ‘Specific enforcement will not be decreed unless the terms of the contract are so expressed that the court can determine with reasonable certainty what is the duty of each party and the conditions under which performance is due.’

49 Am. Jur. § 25, p. 38: ‘For specific performance is demanded that degree of certainty and definiteness which leaves in the mind of the court no reasonable doubt as to what the parties intended, and no reasonable doubt of the specific thing equity is to compel to be done. The element of completeness denotes that the contract embraces all material terms; that of certainty denotes that each one of these terms is expressed in a sufficiently exact and definite manner. . . .’

In *16th Street Investors, LLC v. Morrison*, 153 Wn. App. 44, 223 P.3d 513 (2009), this Court reiterated these requirements and pointed out the high standard of proof required for specific performance:

If an offer is so indefinite that a court cannot decide just what it means and fix exactly the legal liability of the parties, its acceptance cannot result in an enforceable agreement. When parties seek specific performance of a contract, rather than damages, *a higher standard of proof must be met: clear and unequivocal evidence that leaves no doubt as to the terms, character, and existence of the contract.*

Id. at 55-56 (internal quotation marks and citations omitted) (emphasis added).

Here, the lack of agreement allocating the purchase price would have prevented the closing of the sale. The “Closing Escrow Instructions” prepared by the closing agent make this clear:

21. ALLOCATION OF THE PURCHASE PRICE. Both parties are urged to consult their own accountant regarding the allocation of the purchase price. ***Both parties must agree upon the allocation.*** The parties acknowledge and agree that Escrow has made no representations concerning the appropriateness of said allocation or the proposal thereof.

CP 348 (emphasis added). The proposed addendum to the PSA provided:

The parties covenant and agree that the allocation of the purchase price for the assets set forth above is accurate and correct and was separately negotiated.

CP 366. Only CRJ Kim agreed to the proposed addendum. CP 253.⁸

⁸ An addendum to the PSA to allocate the purchase price was necessary because the agents representing the buyer and seller used the wrong form for a sale of a business. They should have used CBA Form PS_2, “Business Opportunity Purchase and Sale Agreement” and the related real estate addendum, listed at <http://www.commercialmls.com/Resources/>

Allocation of the purchase price is also material to the tax treatment of the transaction, for both parties. In “any transfer . . . of a group of assets if the assets transferred constitute a trade or business,” federal tax law “requires the transferor (the seller) and the transferee (the purchaser) each to allocate the consideration paid or received in the transaction among the assets transferred.” 26 C.F.R. § 1.1060-1(a)(1) & (b)(1). State law also requires allocation distinguishing consideration for real property from personal property. Compare RCW 82.12.020(1)(a)⁹ (use tax on personal property) with RCW 82.45.060¹⁰ (excise tax on real estate sales). The instructions for Washington’s real estate excise tax affidavit, which is signed under penalty of perjury,¹¹ provide in relevant part:

Forms/Legal_Library, which specifically allocates the purchase price of the business among its assets.

⁹ RCW 82.12.020 was amended effective January 1, 2016. The version of the statute applicable to the proposed 2015 transaction provided:

(1) There is levied and collected from every person in this state a tax or excise for the privilege of using within this state as a consumer any:

(a) Article of tangible personal property acquired by the user in any manner, including tangible personal property acquired at a casual or isolated sale

¹⁰ “There is imposed an excise tax upon each sale of real property”

¹¹ See WAC 458-61A-303(8).

Section 7:

- List **personal property** included in the selling price of the real property. For example, include tangible (furniture, equipment, etc) and intangible (goodwill, agreement not to compete, etc).
- **Use Tax** is due on personal property purchased without payment of the sales tax. Use Tax may be reported on your Combined Excise Tax Return or a Consumer Use Tax Return, both available at <http://dor.wa.gov>.

* * *

- Enter the **selling price** of the property.

* * *

- **Deduct** the amount of **personal property** included in the selling price.

http://dor.wa.gov/docs/forms/realestexcstx/realestextxaffid_e.pdf

(emphasis in original). Without an agreed allocation of the purchase price, the excise tax affidavit cannot be filed, and the deed cannot be recorded. WAC 458-61A-303(2).

In the absence of agreement allocating the purchase price among the assets of the hotel business, the purchase price of the real property is missing. Just as the failure to include a legal description (or an adequate description) renders the contract void,¹² the failure to include a price

¹² See, e.g., *Key Design Inc. v. Moser*, 138 Wn.2d 875, 983 P.2d 653, as amended, 993 P.2d 900 (1999); *Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 564 (1995); *Herrmann v. Hodin*, 58 Wn.2d 441, 364 P.2d 21 (1961); *Schweiter v. Halsey*, 57 Wn.2d 707, 359 P.2d 821 (1961); *Martin v. Seigel*, 35 Wn.2d 223, 212 P.2d 107 (1949); *Williams v. Fulton*, 30 Wn. App. 173, 632 P.2d 920 (1981); *Howell v. Inland Empire Paper Co.*, 28 Wn. App. 494, 624 P.2d 739 (1981).

allocation renders void a contract to sell real property as part of the sale of a business. The trial court rightly noted that the parties did not discuss the allocation, but reached the wrong conclusion regarding the consequences. Because all essential terms of the agreement to sell the real property were not present, the trial court should have denied CRJ Kim's motion for partial summary judgment and granted summary judgment in favor of JKI.

C. The PSA should be read to give effect to all of its provisions, including the automatic termination provision in the Financing Addendum drafted by CRJ Kim.

The trial court correctly determined that the "New Financing" provision of the Financing Addendum was part of the PSA. CP 21. This determination was based on PSA Paragraph 1, which provided that the purchase price would be paid "[a]ll cash at closing contingent on a new financing in accordance with the Financing Addendum (attach CBA form PS_FIN)." CP 21, 137, and PSA Paragraph 3, which specifically made the Financing Addendum "part of this Agreement." CP 137-38. This conclusion is consistent with basic rules of contract interpretation.

However, the trial court refused to apply the "automatic termination" provision in Financing Addendum Paragraph 1, finding that it was nullified because Addendum Paragraph 2 contained no mirror provision. CP 22. The court's apparent basis for this conclusion was that Addendum Paragraph 2 and Financing Addendum Paragraph 1 were in

conflict, and Addendum Paragraph 2 should prevail because it was typed, while Financing Addendum Paragraph 1 was printed. CP 22.¹³ The trial court erred in concluding that these two provisions, set forth below, are in conflict:

2. This offer is contingent upon Buyer obtaining financing from lender. That financing from the lender is subject to satisfactory of [*sic*] Appraisal, Phase 1 report and Phase 2 report if necessary.

CP 149 (Addendum).

1. NEW FINANCING. Buyer's obligations under the Agreement are contingent on Buyer obtaining new financing. Buyer shall submit a complete written application for financing for the Property within five (5) business days after waiver or satisfaction of the Feasibility Period in Section 5 of the Agreement, pay required costs and make a good faith effort to procure such financing. Buyer shall not reject those terms of a commitment which provide for a loan amount of at least \$ _____ or 80 % of the purchase price, interest not to exceed _____ % per annum, a payment schedule calling for monthly payments amortized over not less than _____ years, and total placement fees and points of not more than _____ % of the loan amount. The Agreement shall terminate and Buyer shall receive a refund of the earnest money unless Buyer gives notice that this condition is satisfied or waived on or before _____ days (60 days, if not completed) following mutual acceptance of the Agreement.

¹³ The court also determined that "only that portion addressing the percentage of the purchase price to be financed is applicable inasmuch as financing is more fully addressed in ¶2 of the addendum." CP 28.

CP 153 (Financing Addendum). The trial court did not explain how these two provisions conflict. They do not: Addendum Paragraph 2 makes the buyer's obligation contingent upon obtaining financing, as does Financing Addendum Paragraph 1. The "New Financing" provision supplies detail about the terms of the financing to be obtained and adds the requirement that the buyer give notice of waiver or satisfaction of the financing contingency in a timely manner. Its provisions do not conflict with the earlier financing term.

A written contract must be interpreted to give effect to all of its provisions, as opposed to rendering some of its language meaningless or ineffective. *Newsom v. Miller*, 42 Wn.2d 727, 731, 258 P.2d 812 (1953); *Salvo v. Thatcher*, 128 Wn. App. 579, 587, 116 P.3d 1019 (2005) ("The provisions of a contract must be construed together and each provision must be given effect."). "Courts can neither disregard contract language which the parties have employed nor revise the contract under a theory of construing it." *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980). Here, CRJ Kim admitted that the automatic termination provision in Financing Addendum Paragraph 1 is part of the PSA. CP 98-99. CRJ Kim initially proposed both the Addendum and the Financing Addendum. CP 134, 379, 381-82. To the extent there is any ambiguity about the meaning of Addendum Paragraph 2 and Financing Addendum Paragraph

1, the trial court should have construed against the drafter, CRJ Kim, and in favor of JKI. *Pierce County v. State*, 144 Wn. App. 783, 813, 185 P.3d 594 (2008) (“Generally, we construe ambiguous contracts against the drafter.”).¹⁴ The trial court erred in finding a conflict where none existed, failing to give effect to clear contractual language, and ignoring the parties’ intent.¹⁵ The automatic termination provision in the Financing Addendum is part of the PSA.

D. The purchase and sale agreement expired by its own terms when CRJ Kim failed to timely notify JKI of satisfaction or waiver of the financing contingency.

Addendum Paragraph 6 provides that the PSA automatically terminates if CRJ Kim fails to remove all contingencies in a timely fashion:

¹⁴ See also Restatement (Second) of Contracts, § 206 cmt.a (1981):

Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert.

Cited in McKasson v. Johnson, 178 Wn. App. 422, 430, 315 P.3d 1138 (2013). Indeed, it appears that CRJ Kim’s agent intended to obscure whether Financing Addendum Paragraph 1 is part of the PSA. CP 382.

¹⁵ *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 83-84, 60 P.3d 1245 (2003) (“The touchstone of contract interpretation is the parties’ intent.”). CRJ Kim’s president clearly intended Financing Addendum Paragraph 1 to be part of the PSA. CP 98-99.

6. Buyer shall remove all the contingencies on or before at the end of each contingencies [*sic*]. Otherwise this agreement shall become null and void, and the earnest money shall be returned to buyer in full.

CP 149. The Financing Addendum contains a similar “automatic termination” provision should CRJ Kim fail to give timely notice regarding the financing contingency:

. . . The Agreement shall terminate and Buyer shall receive a refund of the earnest money unless Buyer gives notice that this condition is satisfied or waived on or before _____ days (60 days, if not completed) following mutual acceptance of the Agreement.”

CP 153.

It is well-established in Washington that contractual notice requirements must be observed by the parties and will be enforced by the courts. *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 78 P.3d 161 (2003). Financing Addendum Paragraph 1 required CRJ Kim to give notice of satisfaction or waiver of the financing contingency by March 2, 2015, 60 days following mutual acceptance. PSA Paragraph 18 required notice to be given in writing. CP 142. Although CRJ Kim provided timely notice that the “feasibility contingency” in PSA Paragraph 5 was satisfied, CP 138, 156, it did not provide any notice regarding the financing contingency.

Providing the written notice required by Financing Addendum Paragraph 1 was a condition precedent. “Where a condition precedent is

not performed within the time required, both parties' contractual duties are discharged." *Salvo*, 128 Wn. App. at 586. *See also Nadeau v. Beers*, 73 Wn.2d 608, 610, 440 P.2d 164 (1968); *Mid-Town Ltd. P'ship v. Preston*, 69 Wn. App. 227, 233-35, 848 P.2d 1268 (1993); *CHG Int'l, Inc. v. Robin Lee, Inc.*, 35 Wn. App. 512, 514-15, 667 P.2d 1127 (1983) ("A condition must be exactly fulfilled or no liability arises on the promise which it qualifies."); *Local 112, I.B.E.W. Bldg. Ass'n v. Tomlinson Dari-Mart, Inc.*, 30 Wn. App. 139, 142-43, 632 P.2d 911 (1981).

In *Nadeau*, the purchase and sale agreement expressly made time of the essence and required closing within 120 days after mutual acceptance, or the agreement would terminate. 73 Wn.2d at 608-09. Believing that 120 days was equivalent to four 30-day months, the buyer tendered full payment on the 123rd day. When the seller refused to close, the buyer sued. On appeal, the Supreme Court reversed the judgment granting specific performance:

Time is made the essence of the agreement, and a termination date is fixed. Payment was not tendered until after the agreement by its terms had expired. Absent conduct giving rise to estoppel or waiver, no further action on the part of [the seller] was required to effectuate the termination. There is no forfeiture involved, for *the agreement, by operation of its time provisions, became legally defunct.*

Nadeau, 73 Wn.2d at 610 (emphasis added).

In *Evans v. Rauth*, 138 Wn. App. 834, 158 P.3d 1261 (2007), this Court addressed a purchase and sale agreement with a similar notice provision to Paragraph 1 of the Financing Addendum:

This Agreement shall terminate and Buyer shall receive a refund of the earnest money unless Buyer gives notice to Seller within 30 days . . . of mutual acceptance of this Agreement stating that Buyer is satisfied, in Buyer's reasonable discretion, concerning all aspects of the Property, including without limitation, its physical condition

Id. at 840 (emphasis added). After the septic system failed inspection, the parties tried to renegotiate but were unable to reach agreement. The buyer “did not waive the results of the septic system inspection,” *id.*, and the seller refused to close. This Court held that the buyer had no right to specific performance because, based on the above automatic termination language, the contract had “expired under its own terms.” *Id.*

A contract which by its terms has expired is legally defunct, and may not be revived. *Pavey v. Collins*, 31 Wn.2d 864, 870, 199 P.2d 571 (1948). Here, the automatic termination provision in the Financing Addendum operated as a “dead man’s switch.”¹⁶ The PSA expired by its terms when CRJ Kim failed to give written notice of waiver or satisfaction

¹⁶ See https://en.wikipedia.org/wiki/Dead_man%27s_switch.

of the financing contingency by March 2, 2015. Because the PSA is legally defunct, it cannot be specifically enforced.

E. JKI did not waive the automatic termination provision in the Financing Addendum, because the essential elements of waiver were not present.

The trial court found that David Kim's conduct after March 2, 2015 was inconsistent with JKI's position that the PSA had expired by its terms on that date. CP 24. As a result, the court ruled that even if the Financing Addendum "automatic termination" provision were part of the PSA, JKI waived its right to enforce that provision. CP 24.

A party to a contract may waive a contract provision that is meant for its sole benefit. *Mike M. Johnson*, 150 Wn.2d at 386. "Waiver is the intentional abandonment or relinquishment of a known right, and an intent to waive must be shown by unequivocal acts or conduct which are inconsistent with any intention other than to waive." *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 143 Wn. App. 345, 361, 177 P.3d 755 (2008). But one party cannot unilaterally waive a contract provision that benefits both parties.¹⁷ *Tomlinson Dari-Mart*, 30 Wn. App. at 143. Waiver will not be inferred from doubtful or ambiguous

¹⁷ CRJ Kim benefitted by the provision because it provided a means for it to walk away from the transaction and recover its earnest money. JKI was benefitted because it provided a deadline after which it could renegotiate the sale to CRJ Kim or seek another buyer.

factors. *U.S. Oil & Ref. Co. v. Lee & Eastes Tank Lines, Inc.*, 104 Wn. App. 823, 830-31, 16 P.3d 1278 (2001).

The trial court erred by looking at the wrong time period for waiver, relying on JKI's actions *after* the PSA had terminated. Any conduct waiving a deadline must take place *before* the deadline. *Mid-Town Ltd. P'ship*, 69 Wn. App. at 234 ("CAYA had the contract right to have the sale agreement closed on or before June 1, 1989. Any conduct waiving the June 1 date had to take place prior to June 1."). "[O]nce a termination date expires, in the absence of an *existing* waiver or estoppel the agreement is dead." *Id.* at 235 (emphasis added). The trial court identified no conduct supporting waiver before March 2, 2015. JKI and CJR Kim expressly agreed that time was of the essence, CP 140 (§ 7), and "[a] provision in an agreement making time of the essence is generally treated as evidence of a mutual intent that specified times of performance be strictly enforced." *Mid-Town*, 69 Wn. App. at 233. Continuing discussions or negotiations after an agreement expires do not revive the agreement. *Evans*, 138 Wn. App. at 840.

Even if JKI's conduct after the March 2, 2015 deadline could have revived the terminated PSA, the trial court should not have made this determination in deciding CRJ Kim's motion for partial summary

judgment. “Whether there has been a waiver is a question of the trier of fact.” *Bowman v. Webster*, 44 Wn.2d 667, 670, 269 P.2d 960 (1954).

F. Claims against David Kim personally should have been dismissed.

Plaintiff’s amended complaint includes a claim against David Kim and his marital community for tortious interference with the contractual relationship between CRJ Kim and JKI. The trial court denied Mr. Kim’s motion for summary judgment, holding that there were disputed facts about whether “Mr. Kim was acting in his own, or JKI’s interest.” CP 29. The court erred because Mr. Kim did nothing to “induc[e] or caus[e] a breach or termination of the [contractual] relationship or expectancy,” and thus CRJ Kim cannot prove all of the elements of a tortious interference claim. *Tacoma Auto Mall, Inc. v. Nissan N. Am., Inc.*, 169 Wn. App. 111, 132, 279 P.3d 487 (2012). Instead, the PSA was unenforceable because it lacked an essential term – the purchase price of the real estate – and also terminated by its own terms because CRJ Kim failed to provide notice under the Financing Addendum. CRJ Kim’s claim against Mr. Kim fails and the court should have dismissed it on summary judgment.

G. JKI is entitled to attorneys’ fees on appeal.

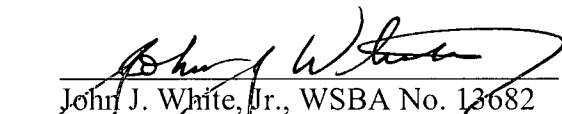
Pursuant to RAP 18.1 and PSA Paragraph 21, CP 144, JKI requests that the Court order CRJ Kim to pay its expenses and attorneys’ fees on appeal. In any lawsuit based on a contract that provides for attorneys’ fees,

“reasonable fees shall be awarded to the prevailing party.” *Metro. Mortgage & Sec. Co. v. Becker*, 64 Wn. App. 626, 632, 825 P.2d 360 (1992). Because CRJ Kim is not entitled to specific performance, it is not the prevailing party in this litigation and the Order and Judgment dated January 29, 2016, CP 8-9, should be reversed.


VI. CONCLUSION

The trial court’s order and judgment should be reversed, and summary judgment should be granted to JKI and David Kim.

Respectfully submitted this 25th day of April, 2016



John J. White, Jr., WSBA No. 13682
Keyin B. Hansen, WSBA No. 28349
of Livengood Alskog, PLLC
Attorneys for Appellant



Dennis J. Perkins, WSBA No. 5774
of Law Offices of Dennis J. Perkins
Attorneys for Appellant


DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on April 25, 2016, I caused service of the foregoing to the following counsel of record:

<i>Attorneys for Plaintiff:</i> Aaron S. Okrent Scott R. Scher Sternberg Thomson Okrent & Scher, PLLC 520 Pike Street, Suite 2250 Seattle, WA 98101 WSBA #18168 Ph: 206-623-4846 Email: okrentlaw@msn.com ; scott@schernet.com	<input checked="checked" type="checkbox"/> via U.S. Mail <input type="checkbox"/> via Hand Delivery <input type="checkbox"/> E-Service <input type="checkbox"/> via Facsimile <input type="checkbox"/> via E-mail <input type="checkbox"/> via Overnight Mail
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Dated: April 25, 2016


Kathryn Barr

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